

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**



76-7420

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SOLOMON CATES, et al.,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC., et al.,

Defendants-Appellees.

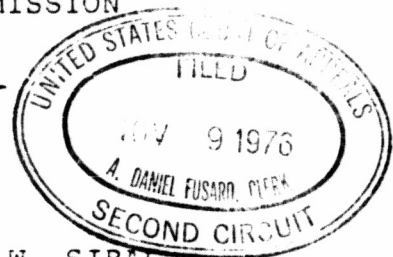
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On Appeal from the United States District Court  
for the Southern District of New York

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BRIEF OF THE UNITED STATES EQUAL  
EMPLOYMENT OPPORTUNITY COMMISSION  
AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency established by Congress to administer, interpret, and enforce Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-et seq. (Supp. II, 1972). Private actions filed under Title VII provide the Commission with essential assistance in securing the elimination of employment discrimination. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

This case presents difficult problems concerning the timeliness of claims for retroactive seniority. This court's resolution of the important questions posed on this appeal may affect the rights of numerous individuals other than the plaintiffs here. Therefore, the Commission would like to present its views to the Court.

ISSUE PRESENTED <sup>1/</sup>

Whether a seniority system which perpetuates the effects of past hiring discrimination continues to violate Title VII and 42 U.S.C. §1981 as long as plaintiffs are subject to the system, so that claims of discrimination are timely.

STATEMENT OF THE CASE

This case is on appeal from the District Court's order granting the motion of Trans World Airlines, Inc. (hereafter "TWA") to dismiss plaintiffs' Second Amendment Complaint. The facts relevant to this appeal as alleged in the complaint are the following:

Plaintiffs Solomon Cates and Jonathan George both initially applied for flight crew positions with TWA on February 28, 1966. They allege that, although

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<sup>1/</sup> This brief does not address the other issues raised by appellants.

they were both fully qualified they were rejected because of their race. [A. 29]. Cates was finally hired on October 17, 1969 and George on August 1, 1969. Cates was furloughed on September 1, 1970 and George on October 5, 1970. [A. 29, 30]. Although both men are eligible for recall to active status, neither has been recalled to date. [29-30].

Plaintiff James Whitehead, Jr., alleges that although fully qualified for, and interested in, a flight crew position with TWA in 1957, he was dissuaded from applying because of the airline's deserved reputation for discriminating against blacks. He was hired by TWA on May 5, 1967 and has continued in their employ since then. [A. 30].

Pursuant to a collective bargaining agreement with the defendant Airline Pilots Association (hereafter ALPA), TWA uses a date-of-hire seniority system to determine many conditions of employment, including selection for, and recall from, furlough status; promotions; and assignment to particular routes, and to particular types of equipment. [A. 32].

Plaintiffs further allege that, because of TWA's discriminatory hiring practices, the plaintiffs and

similarly situated black flight personnel, were hired later than they would have been otherwise. As a consequence, they are at a continuing disadvantage with regard to all conditions of employment which are determined by seniority. [A. 33].

Cates, George and Whitehead all filed charges of discrimination with the Commission on March 24, 1972. These charges were amended on June 1, 1972. Cates received notice of his right to sue on November 27, 1973; George and Whitehead received such notice on November 28, 1973. [A. 29-31].

On December 23, 1973, this class action was instituted on behalf of all blacks affected by the alleged unlawful policies of TWA and ALPA. An amended complaint was filed on March 4, 1974. [A. 1]. This complaint alleged that TWA's seniority policies violated section 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2(a) (Supp. II, 1972), and 42 U.S.C. §1981. The amended complaint also challenged TWA's hiring practices and alleged that the airline continued to discriminate against blacks with regard to terms and conditions of employment. [A. 2]. The complaint also alleged that ALPA violated Title VII and 42 U.S.C. §1981 by failing to fairly represent plaintiffs and the

class they represent. TWA moved to dismiss the amended complaint on the ground that it was time-barred as to both their Title VII and §1981 claims. The district court denied this motion in a memorandum and order dated October 1, 1974. In its opinion the district court held, inter alia, that the limitations period for plaintiffs to file their §1981 claims was tolled when they filed their charges with the EEOC. [A. 20]. The court also held that the allegations in the complaint challenging a pervasive pattern of racial discrimination which continued up until the date of the complaint stated a claim of a present and continuing violation of both Title VII and 42 U.S.C. §1981. [A. 19].

Subsequently, plaintiffs and TWA entered into a stipulation and letter of agreement whereby plaintiffs agreed to withdraw all claims of continuing discrimination except for the claim regarding the operation of the seniority system. In return, TWA agreed to provide certain specific relief to several class members. [A. 23-26]. Pursuant to this agreement plaintiffs filed their second amended complaint on December 12, 1975. This complaint contained allegations of hiring discrimination, of discrimination by means of the operation of the seniority system, and of failure by ALPA to fairly

represent class members. [A. 27]. These allegations were similar to those of the amended complaint. TWA once again moved to dismiss the Title VII claim on the ground that the plaintiffs did not file timely charges with the Commission. TWA also contended that the §1981 claim was barred by the three-year statute of limitations applicable to such actions arising in New York. [A. 37].

The district court granted TWA's motion and dismissed the complaint in its entirety. The court held that for purposes of the applicable limitations periods, Whitehead's claim with regard to the seniority system arose when he was hired in 1967, and Cates' and George's claims arose when they were furloughed in 1970. Since none of the plaintiffs had filed timely charges after their claims arose, the court held that their Title VII suit must be dismissed. [A. 55, 61].

In addition, in light of the Supreme Court's decision in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the court reversed its earlier holding that the §1981 claim was tolled when charges were filed with the Commission. Consequently, the court held that all plaintiffs' claims were barred under the applicable three-year statute of limitations. [A. 62].

The court also dismissed all claims with regard to hiring discrimination as untimely. The court based this holding on the fact that all plaintiffs had been hired by 1969 and TWA had ceased all hiring for flight crew positions in 1970. [A. 45]. The court dismissed the claim against ALPA on the ground that it failed to state a cause of action. [A. 64]. Plaintiffs have appealed.

#### ARGUMENT

PLAINTIFFS CLAIMS IN THIS CASE WERE TIMELY, SINCE THEY CHALLENGED THE OPERATION OF A SENIORITY SYSTEM WHICH CONTINUALLY RENEWS IN THE PRESENT THE PAST DISCRIMINATION PRACTICED AGAINST THEM.

A. Plaintiffs Clearly Have Stated a Timely and Valid Claim Under This Court's Rationale in Acha v. Beame.

This court has recently held that a facially neutral, date-of-hire seniority system violates section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 20003-2(a), insofar as it adversely affects identifiable victims of past discrimination, Acha v. Beame, 531 F.2d 648(1976). The plaintiffs in Acha were female police officers who alleged that, because of the defendant city's discriminatory hiring practices, they were prevented from acquiring enough seniority to withstand a proposed layoff. This court held that

they had stated a claim under Title VII despite the fact that the layoffs were to be made pursuant to a facially neutral, date-of-hire seniority system. Section 703(h) of Title VII, <sup>2/</sup> which exempts certain "bona fide" seniority systems from liability was held not to bar relief.

The rationale of Acha is clear:

Until the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered "bona fide" and in fact represents a continuation of past intentionally discriminatory practices, and thus falls outside the terms of section 703(h). 531 F. 2d at 655. (Emphasis supplied).

See also Nance v. Union Carbide Corp., \_\_\_\_ F.2d \_\_\_\_, 13 FEP Cases 231, 239 (4th Cir. 1976).

Thus, under Acha, a seniority system discriminates afresh each time it operates to penalize an

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<sup>2/</sup> Section 703(h) provides, in pertinent part:

"Notwithstanding any other provision of this title, it shall not be unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

individual because he is the victim of past discrimination. This principle was first enunciated in Papermakers & Paperworkers, Local 189 v. United States, 416 F. 2d 980, 988 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970), in the context of departmental seniority system.

As the Fifth Circuit said in Papermakers:

Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias.

416 F.2d at 988. This court adopted the reasoning of the Papermakers court in United States v. Bethlehem Steel Corp., 446 F.2d 652, 658(1971). Acha v. Beame, supra, applied this principle to a company-wide, date-of-hire, seniority system, such as TWA uses.

Under this theory, a seniority system which renews past discrimination continues to be unlawful as long as it operates. As this court has recognized, a subsequent employment decision which is determined by and gives effect to the results of a previous discriminatory decision itself constitutes a new act of discrimination. Weise v. Syracuse University, 522 F.2d 397, 407(1975). See also Marquez v. Omaha District Sales Office, 440 F.2d 1157, 1162 (8th Cir. 1971); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 890, n. 1 (5th Cir. 1970).

Thus, decisions made by reference to seniority continue to perpetrate new acts of discrimination each time they penalize victims of past discrimination because of seniority deprivations which are the result of the prior discrimination. <sup>3/</sup>

An individual who is adversely affected by a discriminatory system need not challenge the system the first time it operates to his disadvantage. Thus, the plaintiffs in Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973), <sup>4/</sup> were continually adversely affected by Bethlehem's departmental seniority system for years prior to the institution of that action. Yet this court upheld their challenge to the seniority system in question since it continued to have a discriminatory impact on them. <sup>5/</sup>

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3/ If it is otherwise neutral, a seniority system which perpetuates past discrimination is unlawful only as long as, and insofar as, it continues to adversely affect actual victims of that discrimination. Thus once it has been adjusted so that these individuals are treated fairly, the system will operate lawfully. See Stevenson v. International Paper Co., 516 F.2d 103, 118 (5th Cir. 1975).

4/ Williamson was a private action challenging the same seniority system at issue in U.S. v. Bethlehem Steel, *supra*.

5/ See also e.g., Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975); and Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).

Nor is it necessary for an individual who will inevitably be adversely affected by a particular system in the future to have to wait until the actual impact of the system is felt before challenging it. See, e.g., Bartmess v. Drewry's Ltd, U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.), cert. denied 404 U.S. 939 (1971), holding that an employee may challenge a discriminatory retirement system before retirement. Cf. Carr v. Conoco Plastics, Inc., 423 F.2d 57, 64-65 (5th Cir.), cert. denied 400 U.S. 951 (1970), holding that applicants for employment can challenge internal operation of plant.

It follows, in the case of a seniority system, which perpetuates prior discrimination that an individual may challenge the operation of that system as long as he is subject to it, or will be subject to it in the future, provided that the individual can prove that it preserves past discrimination against him. A number of courts have recognized the timeliness of challenges to seniority systems on the basis of the current impact of the system on the plaintiffs. See, e.g., Patterson v. American Tobacco Co., 535 F.2d 257, 275 (4th Cir. 1976); Evans v. United Airlines, Inc., 534 F.2d 1247, 1250 (7th Cir. 1976) (on rehearing); Acha v. Beame, \_\_\_ F. Supp. \_\_\_, 13 FEP Cases 17, 18 (S.D.N.Y. 1976) (on remand); and

Jamerson v. TWA, \_\_\_\_ F.Supp. \_\_\_\_, 11 FEP Cases 1475,  
1477 (S.D.N.Y. 1975). <sup>6/</sup>

Such claims have ordinarily been held barred only in circumstances where it seemed clear that a plaintiff could not have established that the system in fact perpetuated past discrimination against them,<sup>7/</sup> or where the plaintiffs were no longer subject to the system. See Collins v. United Airlines, Inc., 514 F.2d 594, 596 (9th Cir. 1975). (Plaintiff not subject to seniority system because they did not establish their right to be hired); Terry v. Bridgeport Brass Co., 519 F.2d 806, 808 (7th Cir. 1975). (Plaintiffs no longer subject to seniority system since they had knowingly waived their rights to recall).

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6/ Other district court opinions holding such claims timely include Allen v. Amalgamated Transit Union, 415 F.Supp. 662, 666 (E.D.Mo. 976) (appeal pending); Burwell v. Eastern Airlines, Inc., 394 F.Supp. 1361, 1367 (E.D.Va. 1975); Simpson v. Liggett & Myers Tobacco Co., \_\_\_\_ F.Supp. \_\_\_\_, 11 FEP Cases 1183, 1184 (M.D.N.C. 1973); Tippett v. Liggett & Myers Tobacco Co., 316 F.Supp. 292, 296 (M.D.N.C. 1970). Contra, Kennedy v. Braniff Airways, Inc., 403 F.Supp. 707, 710 (N.D.Tex. 1975).

7/ See, Griffin v. PMA, 478 F.2d 1118, 1120 (9th Cir.); cert. denied 414 U.S. 854 (1973); and Jennings v. Illinois Central Railroad, \_\_\_\_ F.Supp. \_\_\_\_, 2 FEP Cases 1042 (E.Tenn. 1970), affirmed per curiam without opinion \_\_\_\_ F.2d \_\_\_\_. 3 FEP Cases 810 (6th Cir. 1971), (semble), discussed infra, at 23.

The district court here relied heavily on Collins in dismissing the complaint. In doing so, however, the court simply misinterpreted Collins. The plaintiff there had been terminated pursuant to United's no-marriage rule for flight attendants. Since she was not a current employee,--and hence had no recall, or any other, rights under a seniority system--the court correctly held that United's refusal to reinstate her did not render its initial termination decision a "continuing" violation. In distinguishing between failure to reinstate and failure to hire (514 F.2d at 596). The court made it quite clear that the plaintiff there was not asserting that she was refused hire because she had previously been unlawfully discharged,<sup>8/</sup> and, unless she established her right to be employed, she could not be affected by decisions based on the seniority system. Thus, it was clear in that case that there was no claim that the alleged past discrimination was being renewed in a present employment decision.

In this case, by contrast, all three named plaintiffs have stated claims under the rationale of Acha v. Beame,

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8/ If there had been such a claim, the case would have been virtually identical, in principle, to Culpepper v. Reynolds Metals Co., *supra*, 421 F.2d at 890, n. 1 and Weise v. Syracuse University, *supra*, 522 F.2d at 407.

supra. Each of them has alleged that, because of TWA's racially discriminatory hiring practices, he was hired later than he otherwise would have been. As a consequence, TWA's date-of-hire seniority system puts the plaintiffs and those similarly situated at a continuing disadvantage as long as TWA continues to make employment decisions with regard to them on the basis of their dates of hire.

Plaintiff Whitehead is still employed by TWA in a flight deck crew position. He alleged that, because of his low seniority, he is handicapped with respect to promotions, assignments and all other conditions of employment which are determined by seniority. Cates and George, the other two named plaintiffs alleged that because of their low seniority status, they were put on furlough status and have not been recalled to flight status.

This court has specifically held that:

Recall privileges after an extended layoff which operate to the residual disadvantage of black workers who had been discriminated against by a seniority system can violate Title VII and are subject to judicial modification.

Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1205 (1972), cert. denied 411 U.S. 931 (1973). See also United States v. Hayes International Corp., 456 F.2d 112, 118-9 (5th Cir. 1972). Thus, in the present case

where recalls from layoff are being made on the basis of a seniority system which allegedly disadvantages the plaintiffs because they are victims of past discrimination, a present violation has been stated. <sup>9/</sup>

B. The District Court's Attempts To Distinguish Acha Conflict With The Established Law of This Circuit.

The district court's very attempts to distinguish this case from Acha v. Beame, supra, instead clearly show that it governs this case. The district court first suggested that Acha applies only to layoffs and not to other adverse effects of seniority systems such as those alleged by Whitehead. This is clearly erroneous. As noted above, this court indicated in Acha that it was merely extending its holding in United States v. Bethlehem Steel Corp., supra, a case involving a departmental seniority system, to cover certain company-wide seniority systems. Significantly, the Bethlehem Steel case specifically did not involve layoffs. See

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9/ Although the complaint does not specifically allege that actual recalls have been made, this fact may readily be inferred from plaintiffs' allegations of continuing discrimination after a layoff. Cox v. U.S. Gypsum, 409 F.2d 289, 290 (7th Cir. 1969). Failure to include this specific fact in the complaint is not grounds for dismissal in light of plaintiffs' general allegations of discrimination. See Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

Williamson v. Bethlehem Steel Corp., supra, 468 F.2d at 1203. Thus, in U.S. v. Bethlehem Steel the same relief was sought from the same sorts of adverse effects of past discrimination as those from which Whitehead seeks relief here, viz, disadvantages with regard to promotions, assignments and other conditions of employment as well as increased risk of layoff.

Furthermore, there is nothing in this court's opinion in Acha to suggest that the general principle enunciated therein--that a company-wide, date-of-hire seniority system may violate Title VII if it transmits the effects of past hiring discrimination into the present--was meant to apply only to layoffs. Nor could such a distinction be justified.

This court has recognized that Title VII prohibits discrimination with respect to all terms and conditions of employment, and not merely with respect to hiring and termination. Weise v. Syracuse University, supra 522 F.2d at 409. Therefore, it would be illogical to hold that layoffs caused by a particular seniority system violate Title VII, while other adverse effects of the same system do not.

The district court held that a current employee, such as Whitehead, cannot challenge his seniority status,

although he has alleged, inter alia, that it increases his risk of being laid off. However, the court also held that an employee who is laid off because of his seniority status can challenge his layoff. Thus, in effect, the court held that Whitehead's claim was premature. The rationale, of course, ignores the fact that Whitehead's seniority status continually affects other sorts of employment decisions (e.g., in promotion, assignments, etc.) regarding him. Furthermore, it is contrary to the principle, enunciated supra, at 11 that an individual may challenge a system which presents a clear and certain threat of affecting him in the future, before he actually feels the impact of such a decision. See Bartmess v. Drewry's Ltd., U.S.A., Inc., supra; and Carr v. Conoco Plastics, Inc., supra. And in addition, it runs counter to the district court's own stated purpose of encouraging individuals who seek retro-active seniority to bring their actions promptly [A. 57].

The district court also held that, since Whitehead had not challenged TWA's discriminatory hiring practices at the time they occurred, he could not now challenge the effects of that discrimination as transmitted by the seniority system [A. 61]. However, an individual affected by a discriminatory system need not challenge the system at the time of its initial impact on him. When Congress

provided in section 706(g) of Title VII that back pay liability would be limited to two years prior to the filing of a charge with the Commission, it recognized an individual's right to challenge a practice that has been affecting him for years prior to the filing of a charge. <sup>10/</sup>

This court has also recognized this right. For, otherwise it is clear that no relief could have been properly sought for the affected class members involved in either Williamson or U.S. v. Bethlehem Steel, supra, since the initial past discrimination in assignment at issue in those cases had taken place years previously. Similarly, in Acha, the plaintiffs were challenging their present seniority status as affected by the past hiring discrimination in question. And the fact that none of the plaintiffs had challenged the hiring discrimination at the time it occurred was not deemed relevant to whether they could seek the relief prayed for at a later date. Under the rationale of these cases, then--although Whitehead may have very severe problems in establishing discrimination against him<sup>11/</sup>--he has clearly stated a claim of discrimination,

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<sup>10/</sup> Section 706(e) provides that a charge must be filed within a maximum of 300 days after the alleged unlawful employment practice occurred.

<sup>11/</sup> Compare EEOC v. Steamfitters, Local 638, \_\_\_ F.2d \_\_\_, 13 FEP Cases 705, 711-12 (1976). See also the discussion infra, pp. 20ff.

based on the adverse effects of the seniority system upon him due to TWA's past hiring discrimination, sufficient to withstand a motion to dismiss. <sup>12/</sup>

The district court's holding that Cates' and George's claims were barred because they were not raised in timely fashion after their layoffs is based on a misconception of this court's holding in Acha. As discussed supra at 8, Acha held that a seniority system which perpetuates past discrimination violates Title VII. Since this system continues to operate with respect to Cates and George by determining their eligibility for recall, their claims are clearly timely. Indeed, they are very similar to the claims involved in Williamson v. Bethlehem Steel Corp., supra, and may also be identical to those asserted Cox v. U.S. Gypsum Co., supra.

Thus, all three plaintiffs stated claims under Acha. Since all of the plaintiffs are still subject to the challenged seniority system their claims were timely.

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<sup>12/</sup> Although Whitehead did not allege that he had actually applied and been rejected for a position with TWA prior to his hiring in 1966, this court has indicated that proof of formal application and rejection is not always required to state a claim for retroactive seniority. Chance v. Board of Examiners, 534 F.2d 993, 1007 (2d Cir. 1976) (on rehearing); Acha v. Beame, supra, 531 F.2d at 656.

C. The District Court's Concerns About  
Potential Prejudice to the Defendant,  
or to Plaintiffs' Co-Workers, Do Not  
Justify Dismissal of Plaintiffs' Action.

The district court's reluctance to hold that the plaintiffs' claims were timely was based essentially on two concerns 1) the potential prejudice to the defendant in defending the claim and 2) the potential prejudice to plaintiffs' co-workers from a grant of retroactive seniority to the plaintiffs.

These concerns are legitimate. But it appears that at least as to the potential prejudice to defendants, the district court's concern was due to a misperception of the seriousness of the potential problems that might arise. Furthermore, it is clear that the district court, as a court of equity, has ample discretionary authority to deal with the problems anticipated, with regard to both the defendant and to plaintiffs' co-workers, without foreclosing a whole category of well recognized claims.

1. The potential problems of prejudice to defendants in dealing with claims for retroactive seniority based on discrimination which occurred some time in the past are largely alleviated by the fact that the burden of proof is on the plaintiff to prove that there was discrimination in the past and that he was an actual victim of that discrimination. Furthermore insofar as a defendant

in a particular case can show that he was actually prejudiced by a plaintiff's delay in challenging the initial discriminatory act, the defense of laches would be available to him.

An individual seeking retroactive seniority long after he was hired would have an unusually difficult burden of proof. Like any other Title VII plaintiff, he bears the burden of proof in establishing discrimination, and the initial burden of producing relevant, comparative evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).<sup>13/</sup> In cases involving isolated instances of discrimination and in those involving a purported justification somewhat peculiar to the plaintiff involved, that burden is quite difficult to bear ordinarily. See Green v. McDonnell Douglas Corp. 528 F.2d 1102 (8th Cir. 1976); Alexander v. Gardner-Denver Co., 519 F.2d 503 (10th Cir. 1975). But, where a plaintiff must attempt to establish such discrimination, or to rebut such a defense, as a predicate to his challenge to the present operation of seniority--and thus must produce comparative

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<sup>13/</sup> Thus under McDonnell Douglas, after the plaintiff produces evidence of arguable qualifications, and the defendant advances a business reason for rejecting him for the employment opportunity in question, the plaintiff has the burden of producing comparative evidence to establish dissimilar treatment. 411 U.S. at 801 ff.

evidence for events long past--that burden can easily become well nigh insurmountable.

Producing the necessary relevant, comparative evidence is not nearly so difficult where the plaintiff can establish a pervasive pattern of employment decisions not readily explainable except by discrimination. See, e.g., U.S. v. Bethlehem Steel Corp., supra. However, a plaintiff seeking retroactive seniority also has the burden of proving that he, personally, was a victim of the past practices involved. See Acha v. Beame, supra, 531 F.2d at 656, and Chance v. Board of Examiners, supra, 534 F.2d at 1007. And establishing this with respect to events long past can also be an obstacle which is extremely difficult to overcome. Cf., e.g., EEOC v. Local 638, Steamfitters, supra, 13 FEP Cases at 711-712; Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, 430 (2d Cir. 1975).

In light of these burdens, and when it is clear that a plaintiff's proof of past discrimination will necessarily depend on conflicting testimony as to the motivation of an event that occurred many years before, it may be sufficiently apparent that plaintiff cannot reasonably be expected to carry his burden of proof so that summary disposition may seem appropriate. While we do not endorse

such a manner of resolving factual disputes, <sup>14/</sup> we do believe that it has tacitly been followed in those few cases which have refused to allow plaintiffs to challenge the present perpetuation by seniority of alleged past discrimination. See, e.g., Griffin v. PMA, supra. <sup>15/</sup>

However, in Acha v. Beame, supra, this court seems clearly to have recognized that factual disputes concerning whether past discrimination has, in fact, been practiced

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<sup>14/</sup> But, cf. EEOC v. Local 638, Steamfitters, supra, <sup>13</sup> FEP Cases at 711-712, where this court found that the nature of the proof which plaintiffs would be required to produce on the issue involved rendered any result so speculative that plaintiffs should not even be permitted to make the attempt.

<sup>15/</sup> Griffin was brought as a §1981 action in 1971. Plaintiffs asked for seniority credit for the time lost as a result of lay-offs in 1946 and 1948-51, arguing that failure to give such credit was a continuing wrong. The court held that because plaintiffs would be forced to establish that the 1946 events were discriminatory the trial court was not wrong in holding that "in these circumstances" the more than 20-year interval barred the suit. 478 F.2d at 1120.

See also Jennings v. Illinois Central Railroad, supra. In Jennings the district court in dealing with the claim of continuing violation characterized the claim as a claim of individualized discrimination in promotion. The court then held that such an individualized claim could not be raised after the charge-filing period had expired because "then the 90 day period would never run." 2 FEP Cases at 1043. Thus, the district court, in Jennings, also seemed concerned with the difficulty of proving discrimination in an individualized case long after the alleged discrimination had occurred.

against plaintiffs should be resolved only after a hearing. Cf. also Nance v. Union Carbide Corp., supra, 13 FEP Cases at 239. And it is quite clear that such disputes cannot be resolved on a motion to dismiss.

Thus the fact that plaintiffs asserting that a seniority system perpetuates past discrimination have the burden of proving that such discrimination existed, and that it personally affected them, will ordinarily serve to protect the defendant from prejudice caused by the passage of time. And in those cases where defendants can prove that they will be prejudiced nevertheless, a Title VII court, sitting as a court in equity, can apply the doctrine of laches to prevent such prejudice. Franks v. Bowman Transportation Co., 495 F.2d 398, 406 (5th Cir.) cert. denied 419 U.S. 1050 (1974).<sup>16/</sup> Cf. also Albemarle Paper Co. v. Moody, 422 U.S. 405, 423 (1975). But it is clear that the legitimate concerns over those few cases where a defendant may be prejudiced should not serve as the basis for holding untimely claims that have been long recognized to be perfectly valid.

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<sup>16/</sup> In Franks, supra, the doctrine of laches was held to be applicable upon an appropriate evidentiary showing even though plaintiffs' action was timely filed.

2. The court also expressed concern for possible prejudice to the plaintiffs' co-employees who might be adversely affected by a claim for retroactive seniority. Thus at one point, the court stated:

An award of constructive seniority, to which plaintiffs may be entitled if they prove their claims, affects the rights of other workers. If plaintiffs are successful, some of these workers, i.e., all those hired between the date plaintiffs' class members would have been hired but for the discrimination and the date they actually were hired, will be displaced in the seniority lists. Some will lose their jobs.

[A. 56-57]. This statement plainly indicates a misconception of the nature of the remedy available to the plaintiff.

This court has indicated that even where plaintiffs show their entitlement to retroactive seniority, it will not order the displacement of incumbent workers. U.S. v. Bethlehem Steel Corp., supra, 446 F.2d at 663-64. See also Patterson v. Newspaper Deliverers' Union, 514 F.2d 767, 774, (1974), cert. denied \_\_\_ U.S. \_\_\_ 96 S.Ct. 3198 (1976). However, the plaintiffs may be entitled to priority in recall based on the seniority status which they would have had absent past discrimination. See, e.g., Acha v. Beame, supra 531 F.2d at 656.

In any event, the court may properly consider the impact on all parties in fashioning appropriate relief

should plaintiffs prove their case. See Acha v. Beame, supra, 531 F.2d at 656, Meadows v. Ford Motor Co., 510 F.2d 939, 948-49 (6th Cir. 1975), cert. denied \_\_\_ U.S. \_\_\_, 96 S.Ct. 2215 (1976). And, as with the possibility of prejudice to the defendants, so also the possibility of prejudicial effects on co-workers in a given case, stemming from any unreasonable delay on the part of plaintiffs can be taken into consideration by the trial court in granting or shaping relief.

Finally sect. n 706(g) of Title VII limits back pay relief to a period beginning two years before charges are filed. <sup>17/</sup> Thus, a plaintiff who was laid off or denied promotion because of seniority status which reflected past discrimination can only recover back pay for a period beginning two years prior to the filing of a charge with the Commission, regardless of how long he has been adversely affected. See Rich v. Martin Marietta Corp., 522 F.2d 333, 348 (10th Cir. 1975).

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17/ Section 706(g) provides, in pertinent part:

Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

Thus, while the district court was properly concerned with the possible unfair effect of the relief sought by plaintiffs on others, it should not and need not have allowed that concern wholly to override its duty to eliminate the present effects of past discrimination. For, it is clear that the district courts have the obligation to ensure the complete eradication of such discrimination to the extent reasonably and fairly possible. U.S. v. Bethlehem Steel Corp., supra, 446 F.2d at 660. See also Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975).

Whether there is past discrimination the effects of which the district court must attempt to eliminate, whether defendants will be prejudiced in attempting to dispute that fact, and how appropriate relief might be devised to attempt to eliminate any discrimination, however, all depend on further proceedings in this case. And, since the plaintiffs claims are clearly timely under the rationale of numerous cases in this circuit, it is clear that this case must be remanded for such proceedings.

CONCLUSION

For the reasons stated above, the judgment of the district court dismissing the complaint in this action should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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